THE LIABILITY OF WATER COMPANIES FOR FIRE LOSSES

IT is a general principle, of very wide application, that a municipal corporation, in the absence of a statute, is not obliged to undertake the execution of governmental functions respecting the health, peace or property of its citizens. Nor is such corporation liable for the insufficient or negligent execution of such functions in case it undertakes to perform them. The ground of this exemption is that the municipality, in these matters, exercises discretionary powers conferred upon it by the state, and acts, not for itself in its corporate capacity, but for the general public as an agent of the central government.

A city, authorized to equip and maintain a fire department, to appoint and remove its officers, and to make regulations respecting their conduct and the management of fires, may or may not undertake to exercise that authority; and in case it does do so, it is not liable for losses suffered by property owners by reason of defective apparatus, insufficient equipment, or the negligence of the firemen employed. It is deemed that the corporation is here engaged in the performance of a public service, from which it derives no special benefit in its corporate capacity; and the members of the fire department, when acting in discharge of their duties, are in effect public officers, and not servants or agents of the city for whose conduct the city can be held liable.[1] In an early case in Indiana, *Brinkmeyer* v. *City of Evansville*,[2] it was sought to evade this general rule on the ground that while it was discretionary with the city whether or not to undertake the maintenance of a fire department, yet when once the city had exercised its discretion by undertaking to give protection against fire, all else became mere ministerial duties, and the city was bound at its peril to make that protection adequate. But the court refused to impose upon the city any such liability.

The same doctrine has been repeatedly affirmed respecting the non-liability of cities, which own and operate waterworks, for failure to adequately supply all parts of the city with fire hydrants, and for negligence in maintaining an insufficient pressure for fire purposes. It seems to be conceded that the supplying of water for general fire purposes is a discretionary, governmental function, as distinguished from one which is purely ministerial and necessarily

[1] Hayes *v.* City of Oshkosh (1873), 33 Wis. 314; Dillon on Municipal Corporations (4th Ed.), § 976; Heller *v.* The Mayor (1873), 53 Mo. 159; Wheeler *v.* City of Cincinnati (1869), 19 Ohio St. 19.

[2] (1867), 29 Ind. 187.

incident to the corporate life of a municipality. Perhaps no better statement of the difference between these two classes of functions has been given than that of Judge Gray in *Springfield Insurance Co.* v. *Keeseville*,[3] where he says:

"The distinction between the public and private powers conferred upon municipal corporations, although the line of demarcation at times may be difficult to ascertain, is generally clear enough. * * * When we find that the power conferred has relation to public purposes and is for the public good, it is to be classified as governmental in its nature, and it appertains to the corporation in its political character. But when it relates to the accomplishment of private corporate purposes, in which the public is only indirectly concerned, it is private in its nature and the municipal corporation, in respect to its exercise, is regarded as a legal individual. In the former case, the corporation is exempt from all liability, whether for non-user or misuser; while in the latter case, it may be held to that degree of responsibility which would attach to an ordinary private corporation."

And it was held that, under this rule, the village of Keeseville was not liable for damages caused by fire in consequence of its negligent failure to maintain sufficient waterworks.

The same rule has been applied in many similar cases, and it has invariably been held that the municipality was not liable for loss by fire due to such negligence on its part. Thus in *Tainter* v. *Worcester*,[4] where the city had cut off a street hydrant near plaintiff's mill because of her failure to pay water rates, by reason whereof her mill was lost by fire, the court said: "The protection of all the buildings in a city or town from destruction or injury by fire is for the benefit of all the inhabitants and for their relief from a common danger; and cities and towns are therefore authorized by general laws to provide and maintain fire engines, reservoirs and hydrants to supply water for the extinguishment of fires. * * * The city did not, by accepting the statute and building its works under it, enter into any contract with, or assume any liability to, the owners of property to furnish means or water for the extinguishment of fires, upon which an action can be maintained." The very elaborate opinion in *Mendel* v. *City of Wheeling*,[5] containing a full citation of authorities, lays down the same rule, which is also followed in *Wright* v. *City Council of Augusta*,[6] and in other cases which it is unnecessary to mention.

[3] (1895), 148 N. Y. 46.
[4] (1877), 123 Mass. 311.
[5] (1886), 28 W. Va. 233.
[6] (1886), 78 Ga. 241, 6 Am. St. Rep. 256.

Nor can the city *by contract* render itself liable for failure to furnish an adequate supply of water, for such a contract would tend to restrict the discretion of the municipality beyond the scope of the charter, and would therefore be void.[7]

It being clear, then, that a municipal corporation is not liable, either in contract or tort, for fire losses due to its negligent failure to furnish a proper public water supply, does the same immunity attach to a private corporation under contract with the municipality to provide water for general fire purposes?

It may be said, by way of introduction to the main question, that a water company which contracts directly with a consumer to furnish him an adequate water supply for fire purposes, is liable for such fire losses as may be sustained by the promisee by reason of a breach of the contract. In *Middlesex Water Co.* v. *Knappmann Whiting Co.*[8] the water company had expressly contracted with the defendant to furnish it with water suitable for drinking purposes and other domestic uses, and for use in steam boilers, and with a sufficient pressure for fire purposes. The defendant's factory caught fire and was destroyed because of the failure of the water company to supply water according to its contract. And the water company was held liable for the loss, notwithstanding that the failure was due to no negligence on its part, but wholly to an unforeseen and unavoidable accident. A similar contract was held to create a like liability in *Middlesex Water Co.* v. *Sawyer.*[9] So in *New Orleans, etc. Co.* v. *Meridian Waterworks Co.*[10] the plaintiff contracted with defendant for a full, adequate and sufficient supply of good, pure water, not less than sixty pounds pressure, for all purposes for which water might be needed or used at the plaintiff's shops. And it was held that plaintiff might show by legal evidence that the furnishing of water for fire purposes was, under the circumstances of the case, within the purview of the contract, and if that were proved, the plaintiff might recover the amount of the loss by fire due to insufficient pressure.

In each of the cases just referred to, however, there was a contract between the property owner and the water company, for a valuable consideration moving from the former to the latter, and hence there was no question of the legal right to bring an action for the breach. But the situation now to be discussed is radically different, in this, that the contract is made by the municipal corpo-

[7] Black *v.* City of Columbia (1883), 19 S. C. 412; Van Horn *v.* City of Des Moines (1884), 63 Iowa 447.

[8] (1900), 64 N. J. L. 240, 49 L. R. A. 572.

[9] (1900), 65 N. J. L. 374.

[10] (1896), 18 C. C. A. 519.

ration with the water company, and an individual property holder attempts to sue for losses resulting from a breach of it. The specific question presented is, In this class of cases, is it a fatal objection to an action *ex contractu* that the plaintiff is a stranger to the contract?

The earliest American case on the general question of the liability of water companies for losses due to fire, is *Nickerson* v. *Bridgeport Hydraulic Co.*,[11] and the court there held that the want of privity was fatal to the action. The court said: "The most that can be said is, that the defendants were under obligation to the city to supply the hydrants with water. The city owed a public duty to the plaintiffs to extinguish their fire. The hydrants were not supplied with water, and so the city was unable to perform its duty. We think it is clear that there was no contract relation between the defendants and the plaintiffs, and consequently no duty which could be the basis of a legal claim."

The year following the above decision, the same question came before the Supreme Court of Tennessee, in *Foster* v. *Lookout Water Co.*,[12] and it was again held, without further discussion, that there was no privity of contract, and hence no right to sue, the *Nickerson* case being cited and approved. The Supreme Court of Georgia, in *Fowler* v. *Athens City Waterworks Co.*,[13] based a similar conclusion on the same ground. To the same effect are *Beck* v. *Kittanning Water Co.*,[14] *Boston Safe-Deposit Co.* v. *Salem Water Co.*,[15] and *Wainwright* v. *Queens County Water Co.*[16]

But the question can hardly be disposed of in this summary way, because privity, in the strict legal sense, is not always necessary as the foundation for a suit on a contract. This was recognized in *Davis* v. *Clinton Waterworks Co.*,[17] where the plaintiff sought to recover damages for a loss by fire due to defendant's failure to provide an adequate fire pressure under its contract with the city. The court sustained a demurrer to the petition, saying: "It is a rule of law, familiar to the profession, that a privity of contract must exist between the parties to an action upon a contract. * * * Exceptions to this rule exist, which must not be regarded as abrogating the rule itself. Thus, if one under a contract receives goods or property to which another, not a party to the contract, is entitled,

[11] (1878), 46 Conn. 24, 33 Am. Rep. 1.
[12] (1879), 3 Lea 42.
[13] (1889), 83 Ga. 219.
[14] (1887), Penn., 11 Atl. 300.
[15] (1899), 94 Fed. 238.
[16] (1894), 78 Hun 146.
[17] (1880), 54 Iowa, 59.

he may maintain an action therefor. So the sole beneficiary of a contract may maintain an action to recover property or money to which he is entitled thereunder. In these cases the law implies a promise on the part of the one holding the property or money to account therefor to the beneficiary. Other exceptions to the rule, resting upon similar principles, may exist. The case before us is not an exception to the rule we have stated. The plaintiff received benefits from the water thus supplied in common with all the people of the city. These benefits she receives just as she does other benefits from the municipal government, as the benefits enjoyed on account of improved streets, peace and order enforced by police regulation, and the like."

While there is the greatest confusion among the cases on the question of the right of a third person to sue on a contract, the above statement by the Iowa court may safely be declared incorrect. In fact, it states no real exception to the rule at all. *Of course* one may sue on an implied contract to recover property held by another to which he is entitled. Such an action is an ancient and well-known common law proceeding, and is based, not on the contract by which the defendant obtained the property, to which contract the plaintiff is a stranger, but on the original liability arising out of the possession by the defendant of the plaintiff's property. The contract which the law implies is an orignial contract between the plaintiff and defendant. Where, then, is there any exception to the general rule requiring privity?

The leading case on the general question of the right of a third party to sue on a contract, is *Vrooman* v. *Turner*.[18] In this case the court laid down the rule that there were two requisites essential to the right, (1) an intention on the part of the promisee to secure some benefit to the third party, and (2) some privity between the promisee and the party to be benefited, and some duty or obligation owing from the promisee to the third person which would give the latter a legal or equitable claim to the benefit of the promise. Respecting the necessity of the first of these requisites, there is practical unanimity of judicial opinion.[19] As to the second requisite there is much conflict. Many authorities hold that it is wholly unnecessary. As an example, take the case of a grantee of real property subject to a mortgage, who, where the grantor is not liable for the debt, promises the latter to assume it. Here there is no privity respecting the debt between the grantor and the mortgagee, and no duty or obligation in respect thereto owing from the grantor

[18] (1877), 69 N. Y. 280.

[19] See cases cited in note on page 106, Pomeroy's Code Remedies (4th Ed.).

to the mortgagee. And yet many courts give the mortgagee the right to sue upon this promise. The recent case of *McKay* v. *Ward*[20] takes this position, and cites a large number of cases from many states, including Pennsylvania, Illinois, Nebraska, Iowa, and Wisconsin, which support it. An elaborate dissenting opinion by Chief Justice Bartch reviews the cases which take the contrary view. But this phase of the question will be considered later in its proper connection.

A number of the cases upon the liability of water companies for losses by fire, refuse to allow the plaintiff to recover on the contract, on the ground that the first of these two requisites is absent, *i. e.*, that there is no intention on the part of the promisee (the city) to secure a benefit to the property-owner. This view is expressed in *Akron Waterworks Co.* v. *Brownless*,[21] *House* v. *Houston Waterworks Co.*,[22] *Bush* v. *Artesian Hot and Cold Water Co.*,[23] *Eaton* v. *Fairbury Waterworks Co.*,[24] *Wainwright* v. *Queens County Water Co.*,[25] and *Wilkinson* v. *Light, Heat and Water Co.*[26] In these cases the contracts merely provided for the supplying of water for general fire purposes. The Supreme Court of Texas said, in the *House* case: "It was not made for the purpose of benefiting him [the plaintiff] or the class to which he belongs. The object and purpose of making the contract was to keep water in the mains which the city might apply to use in the public fountains, by flushing the gutters, or in extinguishing fires in case a conflagration should occur." And the Supreme Court of Idaho said, in the *Bush* case: "There is nothing in the contract in this case which intimates that any breach of contract between the city of Boise and the defendant was to inure to the benefit of any citizen who might consider himself aggrieved."

But on this point the courts of Kentucky, North Carolina and Louisiana take a directly contrary view. In *Gorrell* v. *Greensboro Water Supply Co.*,[27] Clark, J., in delivering the opinion of the court, said: "It is true, the plaintiff is neither a party nor privy to the contract, but it is impossible to read the same without seeing that, in warp and woof, in thread and filling, the object is the comfort, ease and security from fire of the people, the citizens of Greens-

[20] (1899), 20 Utah, 149.
[21] (1895), 10 Ohio C. C. 620.
[22] (1895), 88 Tex. 233, 28 L. R. A. 532.
[23] (1895), Idaho, 43 Pac. 69.
[24] (1893), 37 Neb. 546, 21 L. R. A. 653.
[25] (1894), 78 Hun 146.
[26] (1900), 78 Miss. 389.
[27] (1899), 124 N. C. 328, 46 L. R. A. 513.

boro. * * * The benefit to the nominal contracting party, the city of Greensboro, as a corporation, is small in comparison, and, taken alone, would never have justified the grants, concessions, privileges, benefits and payments made to the water company. Upon the face of the contract, the principal beneficiaries of the contract in contemplation of both parties thereto were the water company on the one hand, and the individual citizens of Greensboro on the other. The citizens were to pay the taxes to fulfill the money consideration named; and furnishing the individual citizens with adequate supply of water, and the protection of their property from fire, was the largest duty assumed by the company. * * * Did the people of Greensboro have just cause to believe that by virtue of that contract they, as well as the corporation, were guaranteed a sufficient quantity of water to protect their property from fire; and did the water company understand it was agreeing, for the valuable consideration named, to furnish a sufficient quantity of water to protect private as well as public property from fire? The intent is to be drawn from the instrument itself, and on its face there can be no doubt it was contracted that the water supply should be sufficient to protect public as well as private property. If so, it follows that when, by breach of that contract, private property was destroyed, the owner thereof, one of the beneficiaries contemplated by the contract, is the party in interest and he, and he alone, can maintain an action for his loss." And similar views are expressed in *Graves County Water Co.* v. *Ligon*,[28] *Duncan* v. *Owensboro Water Co.*,[29] and *Paducah Lumber Co.* v. *Paducah Water Supply Co.*[30]

In *Planters' Oil Mill* v. *Monroe Waterworks and Light Co.*,[31] the court said: "Municipal governments, while legal entities, are no more than convenient regulations instituted by the people, that they may act in their aggregate character to secure their larger protection and happiness. Municipalities are the people acting in their corporate capacity. It was the people's money that was paid the Water Company; it was for the benefit of the people that the promise was made on part of the company to supply water for extinguishing fires. If it were to the public that the promise of the contract was made, then it was to 'the public as composed of individual persons'. The municipality was but the agent of the public

[28] (1902), 112 Ky. 775, 66 S. W. 725.

[29] (1889), Ky., 12 S. W. 557.

[30] (1889), 89 Ky. 340, 7 L. R. A. 77. The very recent case of Lexington Hydraulic Co. *v.* Oots (1905), — Ky. —, 84 S. W. 774, reaffirms the Paducah case after a re-examination of the question.

[31] (1900), 52 La. Ann. 1243.

as thus composed. Its acts in the matter of the contract under consideration were chiefly fiduciary. The beneficiaries are the corporators. It will not do to say the Water Company owes them no duty."

These opinions are quoted at some length because they seem to the writer to express a very sensible and reasonable view. Everyone knows that the people vote and pay taxes for public water rates solely because they wish protection for their property. The more valuable their property the more ready are they to pay for fire protection. To suppose that the voter has in mind that invisible, intangible, imaginary "general public" which owns no particular property when he authorizes his agent, the city government, to grant franchises and pay large sums of money for fire hydrants and fire pressure, is absurd. He has in mind no such figment of the legal imagination. He is thinking of the actual buildings that actually stand along the streets of his city, and he votes to pay for water to protect those very buildings from fire. To say that he pays for the protection of everybody in general but nobody in particular, not even himself, is to credit him with too much benevolence and too little common sense.

It is possible that those courts which deny to the property-owner the right to sue the water company, on the ground that he is not the intended beneficiary, confuse two things which are quite distinct. A city which owns and operates waterworks is not liable to an individual for negligence in connection therewith. But this is not because the city in providing fire protection, and the voters in authorizing it, and the taxpayers in maintaining it, are not acting for the good of the property-owners of the city. The existence of taxable property subject to loss by fire is the single and sole inducement for the city to take up the burden of a public water supply for fire purposes. But some of the cases say that the city acts for the "general public," and not for the property-owners, and hence the individual property-owner has no legal interest in the undertaking. This confuses the ground of the state's action in authorizing the city to maintain the waterworks, with the ground of the city's action in exercising the authority. The state authorizes the city to perform the function because it deems it beneficial to the whole public. But the city undertakes the performance because it deems it beneficial to its own property-owners. From the point of view of the state the supplying of public fire protection is a benefit to the general public, irrespective of the incidental good derived by individuals. Being a general, public benefit, it is peculiarly within the control of the state as the supreme governmental authority. In

other words, providing it is a governmental function. Now, when governmental functions are delegated to municipalities, the immunity of the state from suits by citizens accompanies their exercise. It makes no difference that the sole object which the city has in undertaking them is the protection of the property of the citizens. It is the governmental character of the function which creates the exemption, not the nature of the beneficiary, as some of the cases seem to indicate. The individual property-owner is without a remedy against the city simply because the city, in providing fire protection, exercises the sovereign powers of the state and hence cannot be sued, and not because the fire protection is not actually furnished for his benefit. The fact that the protection is deemed a benefit to the general public makes the city a governmental agent of the state in providing it, and it is this which exempts the city from suit, although the city is actually induced to furnish it and does furnish it solely for the benefit of its citizens. As the court said, in *Springfield Insurance Co.* v. *Keeseville* (*supra*), if "the defendant assumed a governmental function," then it "comes under the sanction of the rule which exempts government from suits by citizens." It is therefore a *non-sequitur* to say that because the city is not liable to individuals, a water company which performs the same acts is also not liable. As a fact the city, when operating waterworks, really acts for the same beneficiary as the water company. Both act, and must act, for the property owners of the city. But when the city so acts it is a discretionary agent of the state, and simply cannot be sued; while the water company does not represent the state and enjoys no such exemption. To hold, as some of the cases cited do hold, that the exemption of the city from suit by individuals is due to the public and general character of the beneficiary, and that therefore the water company, which serves the same purpose, is also exempt, is to overlook the very basis of municipal non-liability. The question is not one of beneficiaries at all, but of a technical exemption from suit, granted, on grounds of public policy, to cities, but denied to private corporations.

But there is another group of cases requiring attention. To preclude the courts from taking the position that the property-owners were not the intended beneficiaries under contracts with water companies, cities began to insert into their contracts the express provision that, in case the water companies neglected to supply sufficient water for fire purposes, as provided for in the contracts, they should be liable in damages to all persons whose property was injured by reason of the inadequate supply. This, of course, rendered impossible the contention that the property-owners were not

intended to be the beneficiaries. But the courts then took refuge in the second of the requisites indicated in *Vrooman* v. *Turner,* namely, the absence of any duty or obligation owing from the city to the property-owners, which would support an action by the latter against the water company.

Phoenix Insurance Co. v. *Trenton Water Co.*[32] is a typical case. The plaintiff sued the Water Company for a fire loss due to the company's breach of contract with the city, basing its right to sue on the ordinance granting the franchise, which provided: "Should said water company * * * fail to furnish a reasonable or adequate supply of water to extinguish any fire, then it shall be liable for all damages occasioned by all such fire or neglect." But the court refused to allow a recovery, on the ground that it was necessary, to entitle a third person to sue on a contract, that there should be some debt or duty owing by the promisee to the third party, citing *Vrooman* v. *Turner.* "In the case at bar," said the court, "the contracting parties were the City of Trenton and the water company. The insurance company is the third party suing and wanting to obtain the benefit of the promise of the water company made to the city. But an essential element is lacking. The city owes no legal duty to the insurance company to furnish water with which to extinguish fires. * * * Conceding that it stands subrogated to whatever right the assured had, what are his rights in a case of this sort against the water company? None whatever."

The same doctrine was subsequently approved by the Missouri Supreme Court, in *Howsmon* v. *Trenton Water Co.*[33] *Mott* v. *Cherryvale Water Co.*[34] is based on the same doctrine, though it is not so fully stated. It was there held that since the city, had it owned the waterworks, would not have been liable for such damages, there was no legal obligation owing from the city to its property-holders which would make a contract of this kind between the city and the company, available to the individuals who owned property in the city. And the Supreme Court of Iowa announced the same rule in *Becker* v. *Keokuk Waterworks Co.*[35] In this case it was held that the law under which the city contracted with the water company conferred no powers upon the city to make a contract of indemnity for the individual benefit of a taxpayer, for a breach of which an action would lie against the water company. This, I take it, must be on the ground that there is no duty or obli-

[32] (1890), 42 Mo. App. 118.
[33] (1893), 119 Mo. 304, 23 L. R. A. 146.
[34] (1892), 48 Kan. 12, 15 L. R. A. 375.
[35] (1890), 79 Iowa, 419, 18 Am. St. Rep. 397.

gation owing from the city to its taxpayers. The court, in effect, said that the contract was *ultra vires,* but it seems clear that the court meant simply that the relation of the city to the taxpayers was not such that the city could, by contract, confer any rights upon them against the water company. This principle seems to be an essential ground of the decision in *Wainwright* v. *Queens County Water Co.*[36] and in *Boston Safe-Deposit Co.* v. *Salem Water Co.,*[37] and was one of the grounds in *House* v. *Houston Waterworks Co.*[38] *Eaton* v. *Fairbury Waterworks Co.,*[39] and *Vanhorn* v. *City of Des Moines*[40] though some of these cases did not contain the special contract of liability to taxpayers. It may be incidentally noted that in several of these cases the argument was made that the imposition of a special tax on the property-owners to pay for the public water service created a legal privity between the water company and the taxpayers. But the courts in every instance held, and we think very correctly, that this feature in no respect altered the situation as it would have existed had the public water rates been paid out of the general tax levies.

If, as these cases hold, the second requisite of *Vrooman* v. *Turner* is necessary, they are probably rightly decided, although there might still be a question whether there is not such a duty owing from a city to its property-owning citizens as will give them the right to sue on a contract made for their benefit. In *Buchanan* v. *Tilden*[41] the duty owing from the promisee to the third person was largely a moral one. The promise was made to a husband by another for the benefit of his wife, and this relation, taken in connection with the peculiar equities of the case, was held sufficient to enable the wife to sue the promisor. In *Dutton* v. *Poole,*[42] the Exchequer Chamber held that the relation between a father and child was sufficient. And in *Todd* v. *Weber*[43] the relation between a father and an illegitimate daughter was held sufficient to satisfy the rule. In none of these cases was the duty a legal or even an equitable one, and no action could have been founded upon it directly. By analogy it might very well be argued that a city is under a duty, extra-legal but no less real, to provide fire protection

[36] (1894), 78 Hun 146.

[37] (1899), 94 Fed. 238.

[38] (1895), 88 Tex. 233, 28 L. R. A. 532.

[39] (1893), 37 Neb. 546, 21 L. R. A. 653.

[40] (1884), 63 Iowa, 447. The very recent case of Blunk v. Dennison Water Supply Co. (1905), — Ohio St. —, 73 N. E. 210, bases a similar conclusion exclusively on the case of Vrooman *v.* Turner.

[41] (1899), 158 N. Y. 109.

[42] 2 Lev. 212, Raym. 302.

[43] (1884), 95 N. Y. 181.

to its citizens. And there are statements in some of the cases to this effect. Thus in *Nickerson* v. *Bridgeport Hydraulic Co.*,[44] quoted *supra,* the court said: "The city owed a public duty to the plaintiffs to extinguish their fire. The hydrants were not supplied with water, and so the city was unable to perform its duty." Again, in *Bienville Water-supply Co.* v. *Mobile,*[45] a bill was filed by the city to enjoin the water company from shutting off the water in the public hydrants, and the court said: "But the company also owes a duty to the public. Neither it nor the city would be permitted, summarily and without making some other provision for the safety of the public, to shut off the water. * * * Changes may and do take place, but where such agencies have thus become incorporated into the municipality itself, it would be the duty of the court to see that these changes are not so violent or summary as to endanger public or private property." But this question is a complex and difficult one and cannot be followed further here.

However, if the second requisite of *Vrooman* v. *Turner* is *not* necessary, it would seem that the group of cases above cited rests upon a very questionable foundation. The two Missouri cases of *Housman* v. *Trenton Water Co.,* and *Phoenix Insurance Co.* v. *Trenton Water Co.,* have already been discussed. These were both decided for the defendant on the ground that there was no duty or obligation owing from the promisee to the plaintiff, the court citing and quoting *Vrooman* v. *Turner.* Now, in 1898 the case of *Hicks* v. *Hamilton*[46] came before Division One of the Supreme Court, wherein a mortgagee brought suit against a remote grantee who had promised his grantor to pay the mortgage debt, the said grantor not being personally liable for it. The court said that *Vrooman* v. *Turner* involved precisely the same question, cited both the above water company cases in support of their decision, and held that the plaintiff was not entitled to sue. But two years later, in 1900, the same question was presented in *Crone* v. *Stinde,*[47] and the court in banc expressly overruled the *Hicks* case, holding that, "The consideration passing between the two contracting parties, by which one of them promises to pay a third, is just as available to the beneficiary as if he himself had paid the consideration." And it was intimated that the two water company cases would have to go by the board.

In Nebraska, also, in the case of *Hare* v. *Murphy,*[48] the same

[44] (1878), 46 Conn. 24.
[45] (1896), 112 Ala. 260, 33 L. R. A. 59.
[46] 144 Mo. 495.
[47] 156 Mo. 262.
[48] (1895), 45 Neb. 809.

doctrine respecting the right of a mortgagee to sue, was approved, the court saying: "It is an established rule of law that where one makes a promise to another for the benefit of a third person, such third person may maintain an action upon the promise, though the consideration does not move directly from him." This case, having been decided after the case of *Eaton* v. *Fairbury Waterworks Co., supra,* overrules the latter in principle, so far as it is based on the lack of a duty or obligation owing from the city to the property-owner. The Pennsylvania case of *Beck* v. *Kittanning Water Co., supra,* is inconsistent in principle with *Merriman* v. *Moore,*[49] which allows a mortgagee to sue a remote grantee on a promise made for his benefit to a grantor who is not liable to him. In the late case of *Tweeddale* v. *Tweeddale,*[50] the broad doctrine was laid down that "where one person, for a consideration moving to him from another, promises to pay to a third person a sum of money, the law immediately operates upon the acts of the parties, establishing the essential of privity between the promisor and the third person requisite to binding contractual relations between them, resulting in the immediate establishment of a new relation of debtor and creditor, regardless of the relations of the third party to the immediate promisee in the transaction." As must be apparent from the discussion of the Kentucky, North Carolina and Louisiana cases, *supra,* those courts likewise hold that the second requisite of *Vrooman* v. *Turner* is wholly unnecessary in order to authorize an action against the water company by a taxpayer.[51]

Our conclusion on this branch of the question is, although the discussion has necessarily been very brief and fragmentary, that the better rule does not require any duty or obligation owing from the promisee to the third person, and that when once it appears that a contract was intentionally made for the primary benefit of a third person, that person is *ipso facto* entitled to sue upon it.

It has been attempted, in several cases, to base the action against the water company on tort, so as to avoid the technical difficulties incident to an action on the contract. But this theory has received little support from the courts. In *Fitch* v. *Seymour Water Co.,*[52] it was contended by the plaintiff that the relation between the city and the water company was not in its nature contractual, but was in fact founded upon a franchise and was therefore a relation created by law under the power conferred on the common council by the

[49] (1879), 90 Pa. St. 78.

[50] (1903), 116 Wis. 517.

[51] See, in addition to the cases already cited, Owensboro Water Co. *v.* Duncan's Adm'x (1895), Ky., 32 S. W. 478, and Jones *v.* Durham Water Co. (1904), 135 N. C. 553.

[52] (1894), 139 Ind. 214, 47 Am. St. Rep. 258.

constitution and laws of the state. Hence the obligation resting upon the water company to furnish sufficient water for fire protection had all the binding force of a statutory enactment, and for a breach of this public duty the water company was liable to any inhabitant of the city who suffered damage thereby. But the court held that the ordinance which gave effect to the contract with the water company was not one which the city was under obligation to enforce, since in enacting it the city moved in its governmental capacity. Therefore no liability could accrue against the city for failure to enforce it, and it followed that the ordinance imposed no public duty upon the water company appointed by the city to carry out the provisions of the ordinance. The only obligation, then, was one based strictly on the contract with the city. The same conclusion was reached in *Fowler* v. *Athens City Waterworks Co.*,[53] and in *Wilkinson* v. *Light, Heat and Water Co.*[54] The case of *Fisher* v. *Greensboro Water Supply Co.*[55] holds that an action in tort will lie, but upon reasoning which seems very loose and unsatisfactory.

In a few cases the position has been taken by the courts that the loss of the property by fire was not the proximate result of the failure to furnish sufficient water, even conceding that the loss would not have occurred had there been sufficient water available. This was the view taken in *Foster* v. *Lookout Water Co.*,[56] *Patch* v. *City of Covington*,[57] and *House* v. *Houston Waterworks Co.*[58] This doctrine has been wholly abandoned by the Kentucky courts, and was only incidentally mentioned in the *Foster* and *House* cases. If it be granted that the contract was made for the benefit of the taxpayers, the position seems untenable.

One other important case demands attention. In all the cases heretofore examined, the loss was suffered by an individual taxpayer. In the very recent case of *Ukiah* v. *Ukiah Water Co.*,[59] the property of the city itself was damaged by fire by reason of the failure of the water company to furnish a sufficient supply of water. This would seem, on first view, to eliminate the question of privity, and to relieve the case of all the difficulties which we have been discussing. But the court held that the water company was under no liability to the city for the loss of its property, notwithstanding that such loss had occurred by reason of the company's failure to

[53] (1889), 83 Ga. 219.
[54] (1900), 78 Miss. 389.
[55] (1901), 128 N. C. 375.
[56] (1879), 3 Lea (71 Tenn.) 42.
[57] (1856), 17 B. Mon. 722.
[58] (1895), 88 Tex. 233, 28 L. R. A. 532.
[59] (1904), 142 Cal. 173.

keep its contract with the city. "Doubtless," said the court, "a water company may so bind itself by contract with a person to furnish him water for the extinguishment of fires as to render itself liable for the value of property of such person destroyed by fire, by reason of its failure to furnish him a sufficient supply of water. It may be assumed here that it is within the power of a municipality as a property-owner, to enter into such a contract with a water company for the protection of the property which it owns as a legal individual, but it certainly needs something more than evidence showing an accepted service for *general fire purposes* to establish such a contract, and the evidence here shows nothing more. The distinction between the powers conferred on municipal corporations for public purposes and for the general public good and those conferred for private corporate purposes is clearly marked by the decisions. In providing protection against fire to its inhabitants, the municipality exercises a power conferred solely for the general public good, and from the exercise of which the municipality, as a property-owner, derives the same incidental benefit that every other property-owner does,—no more, no less. Yet in each there is a contractual relation. The bar to such a recovery in each case is, that the contract was not for the protection of any particular property or person, but was for general benefit of all the property and persons within the municipal limits, and was entered into by the town as a public agency, solely for that purpose, and in the exercise of its power to furnish such general protection. I cannot escape the conclusion that the relations between plaintiff and defendant, as shown by the evidence, are susceptible of no other construction; that the defendant assumed no obligation regarding plaintiff's property different from that assumed by it regarding all of the other property within the town; and that the plaintiff as a property-owner, is without right of action."

Assuming the correctness of the premises in this case—an assumption which does not, in fact, seem tenable, as has been pointed out—, the conclusion is substantially sound. If the contract was made by the city as a governmental agency, solely for the benefit of the "general public," and not for the benefit of the property-owners of the city, and the water company entered into the contract with that understanding, then the damages sustained by any property-owner, whether it be the city or an individual, could not be presumed to have been within the contemplation of the parties, and hence could not become the basis for estimating damages for a breach of the contract, under the well-known rule of *Hadley* v. *Baxen-*

dale.[60] Under these premises, the damages recoverable by the city could be only the difference, if any, between the value of the water supply and fire pressure actually furnished, and the value of the water supply and fire pressure which the company agreed to furnish, estimated with reference to the uses for which the water and fire pressure were furnished.[61] It was sought in *Ferris* v. *Carson Water Co.*[62] to invest the city with a further claim for damages by reason of the diminution in its taxable property due to the fire, but the court said: "The right of taxation vested in the authorities of the city by the legislature did not create an interest, but rather an expectation, which was subject to have been defeated by contingencies that may have arisen, and was altogether too remote to be the foundation of a right of action."

Aside from an action for damages, the only further remedy as against anyone would be a rescission of the contract at the suit of the city. In *Light, Heat and Water Co.* v. *City of Jackson,*[63] the court said: "The remedy by rescission, which the courts are reluctant to afford when adequate damages for breach of contract may be recovered at law, is peculiarly appropriate in cases of this character." But it is beyond the scope of this article to consider the conditions under which the remedy is available.

It must be very clear from this brief discussion of the liability of water companies for fire losses, that the question is merely one phase of the larger question respecting the right of a third person to sue upon a contract. There has been no attempt here to treat that vast and complex subject systematically. I have merely tried to analyze the cases directly touching the special case of the right to sue water companies, and to suggest the obvious merits and defects of the arguments upon which they rest.

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[60] 9 Exch. 353.
[61] Joplin Waterworks Co. *v.* City of Joplin (1903), 177 Mo. 496.
[62] (1881), 16 Nev. 44.
[63] (1895), 73 Miss. 646.